Supreme Court, U.S.
FILED
MAR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GARREY CARRUTHERS, Governor;
O. LANE MCCOTTER, Secretary of Corrections;
ROBERT TANSEY, Warden, PNM,
Petitioners,

v.

DWIGHT DURAN #26571, LONNIE DURAN #26293,
SHARON TOWERS, and all others similarly situated;
JAMES C. GIBSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONERS

PAUL M. SMITH *
DAVID A. BONO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

HAL STRATTON
Attorney General
P.O. Drawer 1508
Bataan Memorial Building
Santa Fe, NM 87504
(505) 527-6000

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases — Page

Hellerstein v. Mr. Steak, Inc., 531 F.2d 470 (10th Cir.), *cert. denied*, 429 U.S. 823 (1976) 3
In re Callister, 673 F.2d 305 (10th Cir. 1982) 2
Keith v. Volpe, 833 F.2d 850 (9th Cir. 1987) 2
Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 3
Palmer v. City of Chicago, 806 F.2d 1316 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 2180 (1987) 4

Statutes and Other Authorities

28 U.S.C. § 1291 2
Moore's Federal Practice ¶ 110.25[1] 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1325

GARREY CARRUTHERS, Governor;
O. LANE MCCOTTER, Secretary of Corrections;
ROBERT TANSEY, Warden, PNM,
Petitioners,

v.

DWIGHT DURAN #26571, LONNIE DURAN #26293,
SHARON TOWERS, and all others similarly situated;
JAMES C. GIBSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONERS

Respondents attempt to show that the ruling of the Tenth Circuit dismissing petitioners' appeal of a post-judgment attorney's fee award was appropriate and that it leaves petitioners avenues for future appellate review of the order at issue. These efforts to defend the Tenth Circuit's ruling are demonstrably unavailing, however, and corrective action by this Court remains essential.

1. Faced with recent decisions in this Court and seven other circuits giving plenary review to fee awards in settings exactly comparable to the present case, respondents offer only a very limited response. They do not attempt to distinguish the cases cited by petitioners, or to cite even a single decision from another circuit supporting their position. Nor do they present more than a cursory defense of the Tenth Circuit's application of the *Cohen* "collateral order" doctrine in this context. Instead, respondents rely on the fact that these other cases do not expressly address the jurisdictional question. The suggestion appears to be that this Court and the seven other circuits simply overlooked the issue of their own jurisdiction and would have agreed with the Tenth Circuit's jurisdictional conclusion if the issue had been presented to them.[1]

This response, of course, ignores the fact that every appellate court has a duty to consider its own jurisdiction before reaching the merits. Moreover, it is especially untenable in view of the cryptic nature of the Tenth Circuit's ruling,[2] and that court's reliance on a single, clearly inapposite precedent involving appeals of *pre*-judgment fee awards.[3] In sum, there is literally nothing to indicate

---

[1] As respondents acknowledge, Br. at 5 n.1, one of the decisions that petitioners cite, *Keith v. Volpe*, 833 F.2d 850 (9th Cir. 1987), did expressly hold that the fee order at issue was appealable under 28 U.S.C. § 1291. 833 F.2d at 851. Their sole response to this holding is to comment that the Ninth Circuit did not offer further explanation of its jurisdictional holding and thus may not have had appealability in mind. Br. at 5 n.1. The more plausible conclusion, however, is that the Ninth Circuit simply viewed the jurisdictional issue as clear and saw no need to present an extended discussion.

[2] As we discussed in the petition, the Tenth Circuit's ruling relies on the proposition that the fee award would be reviewable at the time of the "final award," Pet. App. 3a—without offering any explanation of when or how such a final award would ever occur in this post-judgment context.

[3] Pet. App. 3a (citing *In re Callister*, 673 F.2d 305 (10th Cir. (1982)).

that the court below has discovered a dispositive jurisdictional problem that has gone unseen everywhere else. To the contrary, it seems clear that if this case were in another circuit, petitioners' appeal would not have been dismissed.

2. Respondents attempt to shore up the Tenth Circuit's ruling by suggesting a variety of ways in which petitioners may be able to obtain later appellate review of the present fee award. First, they indicate that the award may be modified in some later fee order covering a later period of time during the implementation process. Br. at 3. This assertion is wholly unsupported by any reference to a statement by the district court that it considers the present fee award to be tentative or subject to later revision. Nor is there any other reason to anticipate such retroactive reconsideration of the present award. It follows that respondents are relying solely on the theoretical power of the district court to revise its prior ruling—a power that is clearly insufficient to preclude immediate review of an order that is definitive on its face. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983).

Second, respondents assert that this litigation will one day "draw to conclusion, at which time all previously nonappealable orders will merge with the final judgment and become reviewable." Br. at 8. This argument, however, merely repeats the Tenth Circuit's error by misunderstanding the difference between pre- and post-judgment orders. In a pre-judgment setting, as the case cited by respondents indicates,[4] there is always a subsequent event—*i.e.*, the judgment—that triggers an appeal of earlier interlocutory orders. Here, by contrast, the judgment was entered in 1980, and the case is proceeding

---

[4] *See* Br. at 8, citing *Hellerstein v. Mr. Steak, Inc.*, 531 F.2d 470 (10th Cir.), *cert. denied*, 429 U.S. 823 (1976), which held that a class certification order is not appealable until after judgment.

with "implementation" of a permanent injunction. While the level of monitoring or other activity in the case may ultimately decline, the injunction itself may stay in place indefinitely. Thus, regardless of what respondents may mean when they anticipate a future "conclusion" of the case, they have not presented a valid argument for deferring appeals of post-judgment orders prior to that unspecified event.

Finally, respondents suggest that petitioners could seek to appeal the 1985 fee award at issue here as an issue pendent to our appeal from a recent order denying a motion to vacate portions of the underlying consent decree. This theory does not, however, solve the problems created by the Tenth Circuit's ruling. To begin with, the proposition that the Tenth Circuit would entertain such an appeal is speculative at best. The motion to vacate, which petitioners have recently appealed, was made in 1987—two years after the time period covered by the fee award—and the appeal primarily involves Eleventh Amendment arguments unrelated to respondents' activities during this earlier period. Even assuming that the Tenth Circuit has the discretionary authority to allow a simultaneous "pendent" appeal of the earlier 1985 fee order, it would exercise that discretion on the basis of its perception of how closely related the two orders are. *See Moore's Federal Practice* ¶ 110.25[1], at 270, 272 (emphasis added). Thus, even if petitioners were to accept respondents' invitation to link the fee issue with their appeal of the denial of the motion to vacate, on the present facts their chances of success would hardly be overwhelming.[5]

---

[5] We note that respondents have only recently filed a motion in the district court seeking fees and costs for their successful opposition to the motion to vacate itself. A ruling on this motion might be appealable pendent to the appeal of the underlying ruling, but only if the district court acts in time to allow consolidation. *See Palmer v. City of Chicago*, 806 F.2d 1316, 1318 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 2180 (1987).

In any event, the existence of a theoretical and very speculative alternative avenue for appellate review in this instance depends on the fortuity that the district court recently issued a separate appealable order. It thus does not solve the problems that will face petitioners if and when the district court rules on the hundreds of thousands of dollars worth of fee requests now pending in that court. There is absolutely no reason to believe that these future orders could be linked on appeal with a separate appealable order. It is far from clear, for example, that either party will be filing additional motions to modify the consent decree that could form the basis for a separate appeal. Thus, even assuming the validity of respondents' imaginative suggestion for obtaining review of the present order, the Tenth Circuit's erroneous dismissal of the present appeal makes it quite possible, perhaps even likely, that petitioners will one day be saddled with huge fee awards that can never be tested in the court of appeals.

3. Respondents conclude their brief by arguing that the present unpublished order of the Tenth Circuit does not raise issues of sufficient importance to warrant the attention of this Court. It is true, of course, that the decision below does not create a formal conflict among the circuits. But that decision leaves the State of New Mexico in the unconscionable position of facing this and future fee awards without any real means for obtaining review. Petitioners are left with no guidance from the court below about precisely why this order was not final, or precisely when, if ever, an appealable order will be issued. And they are left in this position because of a ruling that is flatly and glaringly incorrect. Finally, since the Tenth Circuit apparently considers its ruling so clear as to create no need even for a published decision, there is reason to fear that other parties seeking review of fee orders in other cases—whether plaintiffs or defendants—will be put in the same untenable predicament.

For these reasons, we submit that the ruling below warrants either a summary reversal or a grant of plenary review.

Respectfully submitted,

PAUL M. SMITH *
DAVID A. BONO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

HAL STRATTON
Attorney General
P.O. Drawer 1508
Bataan Memorial Building
Santa Fe, NM 87504
(505) 527-6000
Counsel for Petitioners